122

(1)

Supreme Court, U.S.
FILED
081126 MAR 6 - 2009
OFFICE OF THE CLERK

No. 08-

IN THE
Supreme Court of the United States

EARL MCBEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD B. AYER
New York University
School of Law Supreme
Court Clinic
40 Washington Sq. South
New York, NY 10012
(202) 879-3939

STEPHEN ROSS JOHNSON
Counsel of Record
Ritchie, Dillard & Davies
606 W. Main St., Ste. 300
Knoxville, TN 37902
(865) 637-0661

CHARLES R.A. MORSE
TODD R. GEREMIA
DAVID M. COOPER
Jones Day
222 East 41st Street
New York, NY 10017
(212) 326-3939

March 6, 2009

Counsel for Petitioner

QUESTION PRESENTED

1. Whether the federal felon-in-possession statute, 18 U.S.C. § 922(g), exceeds the bounds of congressional power under the Commerce Clause.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Sixth Circuit were Petitioner Earl McBee and Respondent, the United States of America.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

I. This Court's *Scarborough* Opinion Binds The Courts of Appeals Despite Being At Odds With More Recent Decisions in *Lopez*, *Morrison*, and *Jones* 6

A. This Court's *Bass* And *Scarborough* Decisions Do Not Account For The Commerce Clause Principles Articulated In *Lopez* And Its Progeny 6

B. The Outmoded *Bass* And *Scarborough* Decisions Will Continue To Bind The Lower Courts Until This Court Acts To Clarify The Law 10

TABLE OF CONTENTS
(Continued)

Page

II. The Question Presented Is Important Because The Felon-In-Possession Statute Is Commonly Enforced In A Manner That Raises Serious Federalism Concerns 13

III. The Instant Case Presents An Ideal Opportunity To Resolve This Issue 16

CONCLUSION 18

APPENDIX

United States v. McBee, 295 F. App'x 796 (6th Cir. 2008) 1a

United States v. McBee, 2007 WL 2471788 (E.D. Tenn. Aug. 27, 2007) 6a

TABLE OF AUTHORITIES

Page

Cases

Jones v. United States, 529 U.S. 848 (2000).... passim

Rodrigue de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 12

Scarborough v. United States, 431 U.S. 563 (1977) ..... passim

United States v. Bass, 404 U.S. 336 (1971) ..... passim

United States v. Beasley, 442 F.3d 386 (6th Cir. 2006) 12

United States v. Chesney, 86 F.3d 564 (6th Cir. 1996) 13

United States v. Cortes, 299 F.3d 1030 (9th Cir. 2002) 12

United States v. Kuban, 94 F.3d 971 (5th Cir. 1996) 11, 12

United States v. Lemons, 302 F.3d 769 (7th Cir. 2002) 17

United States v. Lopez, 514 U.S. 549 (1995) ... passim

TABLE OF AUTHORITIES
(Continued)

Page

United States v. McBee, 295 F. App'x 796 (6th Cir. 2008) 1, 3

United States v. McBee, 2007 WL 2471788 (E.D. Tenn. Aug. 27, 2007) 1

United States v. Morrison, 529 U.S. 598 (2000) ..... passim

United States v. Patton, 451 F.3d 615 (10th Cir. 2006) 11, 12, 17

United States v. Rawls, 85 F.3d 240 (5th Cir. 1996) 11

United States v. Singletary, 268 F.3d 196 (3d Cir. 2001) 17

Constitutions and Statutes

18 U.S.C. § 922(g) ..... passim

18 U.S.C. § 931(a) 11

18 U.S.C. App. § 1201(a) 2

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES
(Continued)

Page

Tenn. Code. Ann. § 39-17-1307 (2008) 14

U.S. Const. Art. I, § 8 1

Other Authorities

Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering* Scarborough *in Light of* Lopez, 3 J. APP. PRAC. & PROCESS 671 (2001) 7, 9

City of Philadelphia District Attorney's Office, http://www.phila.gov/DistrictAttorney/AboutUs/meetTheDA.html (last visited Mar. 5, 2009) 15, 16

Michael D. Hines, *Bush Aids Push State Gun Cases into U.S. Courts*, N.Y. TIMES, May 17, 1991 15

Press Release, United States Department of Justice, 10 New Defendants Facing Federal Gun Charges as Part of Project Safe Neighborhoods Enforcement Strategy (July 15, 2006), http://www.usdoj.gov/usao/iln/pr/chicago/2006/pr0615_01.pdf 15

TABLE OF AUTHORITIES
(Continued)

Page

United States Sentencing Commission, 2007 Annual Report, Table 13, http://www.ussc.gov/ANNRPT/2007/Table13.pdf 14

United States Department of Justice, Annual Statistical Report for Fiscal Year 2007, http://www.usdoj.gov/usao/reading_room/reports/asr2007/07statrpt.pdf 14

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit (Pet. App. 1a-5a) is reported at 295 F. App'x 796 (6th Cir. 2008). The opinion and order of the U.S. District Court for the Eastern District of Tennessee (Pet. App. 6a-8a) are unreported but available electronically at 2007 WL 2471788 (E.D. Tenn. Aug. 27, 2007).

JURISDICTION

The court of appeals issued its decision on October 7, 2008. On December 22, 2008, Justice Stevens granted an extension of the time to file a petition for a writ of certiorari from January 5, 2009 to March 6, 2009. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution, which reads in relevant part: "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. Art. I, § 8.

This case also involves 18 U.S.C. § 922(g)(1), which provides: "It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any

firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

STATEMENT OF THE CASE

Title 18, section 922(g)(1) of the United States Code makes it a federal crime for any person who was previously convicted of a felony to "possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." In *Scarborough v. United States*, 431 U.S. 563 (1977), this Court held that under § 922(g)'s predecessor statute[1] the government could satisfy the interstate commerce element merely by showing that the firearm had traveled across state lines at any point in time. Since *Scarborough*, however, this Court has held in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Jones v. United States*, 529 U.S. 848 (2000), that Congress's power to regulate under the Commerce Clause extends only to conduct that "substantially affects" the channels or instrumentalities of interstate commerce or has some other "evident commercial nexus" to interstate commerce. *Lopez*, 514 U.S. at 593, 580. In the wake of these cases, several courts of appeals have expressed serious doubts about whether section

[1] Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. App. § 1201(a) (repealed 1986).

922(g) is consistent with the limits imposed on congressional power by the Commerce Clause.

1. This case arises out of a series of incidents between neighbors in Grainger County, Tennessee, which is a rural county in the eastern part of the state. Joint Appendix to *United States v. McBee*, No. 08-5166 (6th Cir.) ("JA") 78. From time to time, Petitioner Earl McBee was harassed by Jammie Nicley, another member of the community, and officers of the local Sheriff's Office were called to the scene. JA59-60, 78. On at least one such occasion, Nicley confronted McBee with a firearm, shot at McBee's feet, and told McBee he would kill him. JA78. In some of these fights, either Nicley or his girlfriend, Christine Lara, admittedly lied to the police and falsely reported that McBee had shot at them, or that McBee had brandished a gun, in an attempt to have McBee arrested and removed from the area. JA74. On occasion, charges of violating state criminal law were filed against McBee, but they were always later dismissed. JA383-84. Concerned for his safety in light of Nicley's behavior, and in order to defend his family and property, McBee obtained a shotgun and rifle and hung them on his bedroom wall. JA235-37.

McBee called the Grainger County Sheriff's Office to report a neighbor, Mike Bright, for allegedly threatening him (JA280-81), and, when an officer arrived, Bright claimed McBee had assaulted him (JA282). The officer did not take either man into custody, and Bright was informed that if he wanted

McBee prosecuted for assault under state law, he would have to come to the Sheriff's Office and swear out a warrant. JA281. Bright took this to mean that the Sheriff's Office did not believe his story, so he spoke with Tracy Stone, who was his friend and an Assistant U.S. Attorney. JA289. Bright told Stone that he knew McBee possessed two guns, and Stone referred him to a contact with the federal Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF"). JA290-91. Bright subsequently swore out a warrant for aggravated assault against McBee with Grainger County authorities. JA292-93.

On May 22, 2007, officers from the Grainger County Sheriff's Office executed the arrest warrant on McBee at his home in Rutledge, Tennessee. JA8. This time, however, the local Sheriff's officers were joined by federal agents from the ATF. JA8. The agents asked McBee if he had any firearms in his home. McBee told the agents that he had a rifle and a shotgun, which he kept for protection, and led the agents to the two firearms, which were mounted on the bedroom wall. JA8-9. Because McBee had been previously convicted of growing marijuana on his farm, a crime for which he had served three years probation, he was arrested for violating § 922(g)(1). JA9. According to the arresting agents, the sole basis for federal jurisdiction is that "the firearms recovered from McBee's residence were manufactured outside of the State of Tennessee." JA9. The assault charge that originally brought the Sheriff's officers and ATF agents to McBee's home was dismissed in state court. JA384.

2. On June 5, 2007, a federal grand jury in the Eastern District of Tennessee indicted McBee on the charge that he knowingly possessed, in or affecting commerce, two firearms and ammunition, and that he was previously convicted of a crime which could have been punished by a prison sentence of one year or greater. JA10. On August 9, 2007, McBee filed a motion in the district court to dismiss the indictment for lack of federal jurisdiction. JA19. His motion argued, *inter alia*, that the three-category approach to the Commerce Clause set forth by this Court in *Lopez*, *Morrison*, and *Jones* cast serious doubt on this Court's decision in *Scarborough*, and cited recent circuit court decisions questioning the application of § 922(g) to cases which fall outside the three categories of *Lopez*. JA22-25. In a memorandum opinion, the district court denied McBee's motion and relied on this Court's decision in *Scarborough* for the proposition that an interstate commerce nexus can be established merely by showing that the firearm traveled across state lines at any time. Pet. App. 8a.

Following the denial of his motion to dismiss, McBee entered a conditional guilty plea to a violation of § 922(g), retaining the right to appeal the district court's ruling that the application of § 922(g) in this case was constitutional. Pet. App. 2a. The district court sentenced McBee to 21 months in prison. JA1, 36.

McBee timely appealed to the United States Court of Appeals for the Sixth Circuit, arguing that the application of § 922(g)(1) in this case is

unconstitutional under this Court's decisions in *Lopez*, *Morrison*, and *Jones*. JA11. The Sixth Circuit affirmed on the ground that *Scarborough* binds the lower courts on the issue in this case. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

I. This Court's *Scarborough* Opinion Binds The Courts of Appeals Despite Being At Odds With More Recent Decisions in *Lopez*, *Morrison*, and *Jones*

A. This Court's *Bass* And *Scarborough* Decisions Do Not Account For The Commerce Clause Principles Articulated In *Lopez* And Its Progeny

This Court held in *Lopez* that a defendant's conduct must "substantially affect" interstate commerce before Congress can criminalize it under its Commerce Clause powers. 514 U.S. at 593. In contrast to *Lopez*, two earlier decisions of this Court, *United States v. Bass*, 404 U.S. 336 (1971), and *Scarborough*, held that the government can satisfy the interstate commerce requirement under the felon-in-possession statute merely by showing a "minimum nexus" that a firearm traveled across state lines at some point in time. The courts of appeals have recognized the tension between *Lopez*'s "substantially affects" standard and *Scarborough*'s older "minimal nexus" test. Despite *Lopez*'s language to the contrary, the courts of appeals have felt bound to apply the less rigorous test from *Scarborough* in deciding the constitutionality of § 922(g).

This Court in *Scarborough*—a decision that came at a time when Congress' Commerce Clause power was at its apex[2]—never directly addressed the Commerce Clause question. *Scarborough* recognized that "Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality of [§ 1202(a)]." 431 U.S. at 575 n.11. Nonetheless, this Court *assumed* that only a "minimal nexus" between regulation of the particular firearm and interstate commerce was necessary to comport with the Commerce Clause.[3] *Id.* at 577.

This assumption, however, has been called into serious question following this Court's holding in *Lopez* that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Lopez*, 514 U.S. at 559. Of particular importance in the context of criminal statutes, this Court has rejected "'costs of crime' and 'national productivity' arguments because they would

---

[2] *See* Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering* Scarborough *in Light of* Lopez, 3 J. APP. PRAC. & PROCESS 671, 674 (Fall 2001) ("Justice Thurgood Marshall's opinion for the Court in *Scarborough* was written during the era when the Supreme Court was broadly interpreting Congress's authority to outlaw criminal conduct pursuant to its interstate commerce regulatory power under Article 1, section 8, clause 3 of the United States Constitution.").

[3] Similarly, in *Bass*, "[n]o question of the quantum of evidence necessary to establish the Government's prima facie case [was] before the Court." 404 U.S. at 351 (Brennan, J., concurring); *see also Scarborough*, 431 U.S. at 568 ("It was unnecessary in *Bass* for us to decide what would constitute an adequate nexus . . . .").

permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.'" *Morrison*, 529 U.S. at 612-13 (quoting *Lopez*, 514 U.S. at 564). The opinion in *Scarborough*, however, relied on just such a tenuous connection to interstate commerce in holding that the mere fact that a firearm has, at some point, traveled across state lines is sufficient to establish the requisite nexus to interstate commerce.

In *Lopez*, this Court sought to define the "outer limits" of Congress's Commerce Clause power and to reaffirm the principles of federalism on which the Clause is based. 514 U.S. at 557-58. In doing so, *Lopez* held that Congress has three basic areas of authority to regulate commerce: (1) regulation of the "channels of interstate commerce"; (2) regulation and protection of "the instrumentalities of interstate commerce"; and (3) regulation of "those activities having a substantial relation to interstate commerce." *Id.* at 558-59.

The felon-in-possession statute does not purport to regulate the "channels" or "instrumentalities" of interstate commerce, and thus, to pass muster under *Lopez*, must fall within the category of "activities having a substantial relation to interstate commerce." *Id.* But *Lopez* restricted the third category of Congress's commerce power to regulations that have either a "substantial affect[ ]" on interstate commerce or that are "essential part[s] of a larger regulation of economic activity." *Id.* at 560-61. In

restricting Congress's power under the Commerce Clause in this manner, *Lopez* reflected a concern that a broader reach of the commerce power would leave no "activity by an individual that Congress is without power to regulate." *Id.* at 564; *see also Morrison*, 529 U.S. at 610 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."). Facing federal criminal statutes that reached conduct traditionally left to the States, *Lopez* and *Morrison* recognized the key constitutional "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18 (citing *Lopez*, 514 U.S. at 568).

This distinction is particularly relevant here. As the Court noted in *Morrison*, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 618. And firearm experts estimate that over ninety-five percent of all firearms in the country have crossed state lines at some point. Newton, *supra* note 2, at 681-82. Thus, under *Scarborough*'s "minimum nexus" test, hardly a firearm in the country would fall outside the ambit of § 922(g). In light of these federalism concerns, the mere fact that a firearm has, at some point, crossed state lines should not suffice to give Congress the power to criminalize possession of the firearm under the Commerce Clause. As this Court has made clear in *Lopez* and *Morrison*, such a "minimum nexus" is

no longer sufficient to show the requisite impact on national commerce.

In *Jones*, too, this Court raised concerns about the serious constitutional issues that a broad interpretation of the federal arson statute would raise, in light of *Lopez* and *Morrison*. 529 U.S. at 858. While *Jones* did not seek to answer such questions, they are squarely presented by this case and the felon-in-possession statute. In particular, the question of how the possession of a firearm by a felon is either an activity that "substantially affects" interstate commerce or is "an essential part of a larger regulation of economic activity," and not merely "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise," has not yet been reached by this Court. *Lopez*, 514 U.S. at 551-61. The Court should grant the petition and resolve this issue.

B. The Outmoded *Bass* And *Scarborough* Decisions Will Continue To Bind The Lower Courts Until This Court Acts To Clarify The Law

A number of courts of appeals have acknowledged the conflict set forth above, and have openly questioned the continuing validity of *Bass* and *Scarborough*. These courts have noted that *Scarborough*'s reliance on a "minimal nexus requirement" is inconsistent with this Court's holding in *Lopez* that Congress may regulate activity only if it "substantially affects interstate commerce." *Lopez*, 514 U.S. at 559.

In particular, the Tenth Circuit opinion in *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006), goes to great lengths in exploring the "considerable tension between *Scarborough* and the three-category approach adopted by the Supreme Court in its recent Commerce Clause cases." In *Patton*, the Tenth Circuit considered another federal statute, 18 U.S.C. § 931(a), which applies to body armor, and is very similar to § 922(g). The court concluded that the statute could not properly regulate activity that substantially affects interstate commerce under a theory that crime necessarily has such an effect, as that proposition was soundly rejected in *Lopez* and *Morrison*. *Id.* at 630-32. Turning to the jurisdictional element in the statute, the Court reasoned that a "jurisdictional hook that restricts a statute to items that bear a 'trace of interstate commerce' is no restriction at all." *Id.* at 633 (citing *Jones*, 529 U.S. at 857).

Similarly, the Fifth Circuit observed in a concurring opinion (joined by all of the judges on the panel) that it is "difficult to understand how a statute construed never to require any but such a per se nexus could 'ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.'" *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (Garwood, J., concurring) (citing *Lopez*, 514 U.S. at 561). The same court has since noted that, if it were faced with the constitutionality of § 922(g) "res nova a powerful argument could be made for a contrary result." *United States v. Kuban*, 94 F.3d 971, 973 n.4 (5th Cir.

1996). The Ninth Circuit has similarly noted that "[t]he vitality of *Scarborough* engenders significant debate." *United States v. Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir. 2002).

Despite these misgivings, the Fifth, Ninth, and Tenth Circuits have all refrained from invalidating § 922(g). *See Kuban*, 94 F.3d at 973; *Cortes*, 299 F.3d at 1037 n.3; *Patton*, 451 F.3d at 636. This outcome is dictated by this Court's long-standing rule that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Courts of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodrigue de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

In upholding § 922(g) against McBee's challenge, the Sixth Circuit was well aware of the grave concerns expressed by a number of courts of appeals as to whether *Scarborough* remains good law. Pet. App. 4a (noting that the courts of appeals had adhered to the precedential force of *Scarborough*, "whatever their views on the statute"). Just like those other courts, however, the Sixth Circuit was constrained by the rule that "'[u]nless and until the Supreme Court takes the next step, we are bound to follow its current statement of the law on this subject.'" Pet. App. 3a (quoting *United States v. Beasley*, 442 F.3d 386, 392 n.3 (6th Cir. 2006)). Indeed, the Sixth Circuit below relied exclusively upon this Court's holdings in *Bass* and *Scarborough*—

without consideration of the merits of McBee's claims. In short, the Sixth Circuit was in no position to settle the underlying debate as to *Scarborough*'s continuing validity.[4] That role remains uniquely with this Court.

II. The Question Presented Is Important Because The Felon-In-Possession Statute Is Commonly Enforced In A Manner That Raises Serious Federalism Concerns

The issue here is clearly an important one, as it concerns the constitutionality of a commonly used statute that has evaded scrutiny under the Commerce

---

[4] It is worth noting that the Sixth Circuit's opinions on this matter have not always been so neutral. In *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996), a post-*Lopez*, pre-*Morrison* and -*Jones* case, a deeply divided Sixth Circuit panel upheld the application of § 922(g). The majority relied upon the "presence of a jurisdictional element in § 922(g)(1)" in upholding the statute. *Id.* at 569. In a vehement concurrence, Judge Batchelder chastised the majority for "reading *Lopez* as simply reaffirming the Court's previous, expansive Commerce Clause jurisprudence," which "effectively holds that *Lopez* has done nothing to rein in Congress's interstate commerce power, save perhaps to establish some sort of empty, formalistic requirements with which Congress must comply in order to legislate under that power." *Id.* at 580 (Batchelder, J., concurring). She went on to criticize the majority's argument that *Bass* and *Scarborough* had implicitly affirmed § 922(g)'s constitutionality, finding "no basis in our jurisprudence permitting us to rely upon the Supreme Court's silence on a matter of constitutional significance as any indication, much less a 'clear' indication, that the Court has, in effect, already passed upon a constitutional question." *Id.* at 581 (Batchelder, J., concurring).

Clause because of *Scarborough*. As discussed above, *Scarborough* applied the wrong test, and the felon-in-possession statute thus has never undergone the evaluation required by *Lopez* and its progeny. With this shield in place, the statute has been increasingly used for federal prosecution of local gun possession.[5] This case presents a paradigmatic example.

It is conceded that McBee never traveled in interstate commerce with the firearms he possessed, nor intended to use them in any way that might affect interstate commerce. McBee's intrastate possession of the weapons on his bedroom wall was solely for the protection and defense of his own home. Despite these uncontested facts, as well as McBee's susceptibility to enforcement of state law, TENN. CODE. ANN. § 39-17-1307 (2008), he was charged with a federal crime. This charge was brought not because McBee had committed another federal offense, nor because he was under suspicion from federal officials, but solely because his neighbor had been advised by a friend in the U.S. Attorney's office that he should

[5] In 2007 alone, there were at least 8,355 convictions for federal firearms offenses, or approximately 11.5% of all federal criminal convictions. United States Sentencing Commission, 2007 Annual Report, Table 13, http://www.ussc.gov/ANNRPT/2007/Table13.pdf. Moreover, this percentage only includes cases where the firearm charge was the "primary offense category," and does not include some convictions for other offenses where a firearm was also involved. Nationwide, 12,087 defendants were charged with some violation of the federal firearms statute. United States Department of Justice, Annual Statistical Report for Fiscal Year 2007, at 23, http://www.usdoj.gov/usao/reading_room/reports/asr2007/07statrpt.pdf.

involve federal ATF officials in the matter. *See supra* at 3-4. While McBee's case may appear to be a unique or isolated incident, it is actually part of a trend.

The U.S. Department of Justice has increasingly used § 922 to effectively federalize simple state gun possession cases. This practice began before this Court's warning to the contrary in *Lopez*, *see* Michael D. Hines, *Bush Aids Push State Gun Cases into U.S. Courts*, N.Y. TIMES, May 17, 1991, but it continues to this day. As a troubling consequence, some localized, non-violent possession cases, such as McBee's, are taken out of state court and moved to federal court merely because the gun in question has crossed between states at some time.

Indeed, federal prosecutors are quite clear that their goal is the "federal prosecution of state defendants for gun crimes to obtain longer sentences." Press Release, United States Department of Justice, 10 New Defendants Facing Federal Gun Charges as Part of Project Safe Neighborhoods Enforcement Strategy (July 15, 2006), http://www.usdoj.gov/usao/iln/pr/chicago/2006/pr0615_01.pdf. And state prosecutors have similarly acknowledged that this pipeline of gun cases from state to federal court bears no relationship to any interstate commerce concern. For example, the Philadelphia District Attorney boasts on her website that she "created the 'Federal Alternative to State Trials' Unit to punish firearms offenders in the federal court system, where gun offenders receive

stiffer sentences under the federal guidelines." City of Philadelphia District Attorney's Office, http://www.phila.gov/DistrictAttorney/AboutUs/meetTheDA.html (last visited Mar. 5, 2009).

The removal of ordinary state-level criminal gun cases to federal court, merely to achieve a more desirable federal sentence, is exactly the kind of result that this Court's federalism jurisprudence has tried to prevent. If *Lopez* and *Morrison* have any practical significance, they must circumscribe the jurisdiction under § 922(g) to only those cases that have a real, substantial affect on interstate commerce.

III. The Instant Case Presents An Ideal Opportunity To Resolve This Issue

This case presents an excellent vehicle to resolve the question of how far this Court's recent Commerce Clause jurisprudence actually limits Congress's power to criminalize firearm possession that has only a nominal connection to interstate commerce. The facts are uncontroverted. McBee was convicted of being a felon and possessing in his home a shotgun and a rifle that had been manufactured in another state. *See* JA29-35. He preserved in his plea agreement the issue of the constitutionality of 18 U.S.C. § 922(g)(1). Pet. App. 2a. The issues were fully argued to the district court and the Sixth Circuit, which both held that they were bound by this Court's precedent regardless of their views on the reconcilability of *Scarborough* with *Lopez* and its progeny. Pet. App. 4a, 8a.

Although this Court has denied review of this question in the past, including twice since the decision in *Jones*, this case presents a better vehicle for deciding the question presented. The two cases attempting to raise this issue before the Court – *United States v. Singletary*, 268 F.3d 196 (3d Cir. 2001), *cert. denied*, 535 U.S. 976 (2002), and *United States v. Lemons*, 302 F.3d 769 (7th Cir.), *cert. denied*, 537 U.S. 1049 (2002) – came quite quickly after the decision in *Jones*.[6]

These cases also involved significantly different facts than those at issue here.

In *Singletary*, the firearm in question was manufactured in Brazil, and was illegally transported into the country. *Singletary* Pet'n, No. No. 01-8514, at 4. The firearm in that case thus had a much more significant nexus to interstate or international commerce. In *Lemons*, the firearm was seized from the defendant's automobile after occupants reported that he flashed it while driving. *Lemons* Pet'n, No. 02-653, at 2. Since this action took place on the roadways, it could have an effect on the

---

[6] This Court also denied certiorari in *Patton*, 549 U.S. 1213 (2007), which presented the Commerce Clause issue in the context of the body armor possession statute. While there are similar legal issues regarding the constitutionality of this statute and the felon-in-possession statute, there could be differences in how the possession of body armor, as opposed to firearms, affects interstate commerce. And it makes more sense to consider the Commerce Clause issue in the context of the felon-in-possession statute, since it is more frequently used and was the subject of this Court's decision in *Scarborough*.

channels of interstate commerce that is not present for McBee's constructive possession in his home.

In any event, it made sense to deny review of these cases to let the impact of *Lopez*, *Morrison*, and *Jones* percolate throughout both the lower courts and Justice Department policy. Now, however, there is no reason for further delay in deciding this issue of unquestionable importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD B. AYER
New York University
School of Law Supreme
Court Clinic
40 Washington Sq. South
New York, NY 10012
(202) 879-3939

CHARLES R.A. MORSE
TODD R. GEREMIA
DAVID M. COOPER
Jones Day
222 East 41st Street
New York, NY 10017
(212) 326-3939

STEPHEN ROSS JOHNSON
Counsel of Record
Ritchie, Dillard & Davies
606 W. Main St., Ste. 300
Knoxville, TN 37902
(865) 637-0661

March 6, 2009

Counsel for Petitioner

APPENDIX

United States Court of Appeals,
Sixth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Earl McBEE, Defendant-Appellant.
No. 08-5166.
Oct. 7, 2008.

On Appeal from the United States District Court for the Eastern District of Tennessee.

BEFORE: SILER, McKEAGUE, and LUDINGTON, Circuit Judges.[1]

MEMORANDUM OPINION

McKEAGUE, Circuit Judge.

Earl McBee was arrested and indicted for being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1). He entered a conditional guilty plea, contingent on the preservation of one issue for appeal. He now appeals the district court's denial of his motion to dismiss, challenging the validity of the statute as an exercise of Congress's Commerce Clause power. Because this issue has already been definitively resolved by the Supreme Court and the Sixth Circuit, we affirm the district court's order.

---

[1] The Honorable Thomas L. Ludington, United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

In February 2000, McBee was convicted in Tennessee state court of manufacturing a controlled substance. The penalty for this crime exceeded one year.

Officers of the Grainger County Sheriff's Department arrested McBee on May 22, 2007 while executing an arrest warrant for aggravated assault. McBee was at his home when the officers arrived, and he did not object to being taken into custody. He told the arresting officers that he had firearms and ammunition in his house. He consented to a search of his house, and the officers retrieved a shotgun and a rifle, as well as shotgun ammunition and rifle ammunition. McBee signed a statement saying he owned the firearms and ammunition.

An expert from the Bureau of Alcohol, Tobacco, Firearms, and Explosives determined that the firearms and ammunition were manufactured outside of Tennessee. McBee stipulated to this finding.

McBee entered a conditional guilty plea of being a felon in possession in violation of 18 U.S.C. § 922(g) before the district court. The plea was conditioned on the preservation of the issue of "whether proof that a firearm previously traveled at some time in interstate commerce is sufficient to establish the commerce clause jurisdictional nexus for a conviction to be had under 18 U.S.C. § 922(g)." (Mot. to Dismiss at 1.) The district court denied the motion to dismiss, relying on *Scarborough v. United States,* 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977). McBee timely appealed the district court order.

II.

Stare decisis controls this case. Precedents in both the Supreme Court and the Sixth Circuit directly address the constitutionality of the felon-in-possession statute. McBee asserts that the direction of the Supreme Court's Commerce Clause jurisprudence indicates that the Supreme Court would not find the jurisdictional nexus sufficient. However, this court does not engage in speculation; we are bound by what the Supreme Court has said, not what it might say. "Unless and until the Supreme Court takes the next step, we are bound to follow its current statement of the law on this subject." *United States v. Beasley,* 442 F.3d 386, 392 n. 3 (6th Cir.2006).

In *Scarborough,* the Supreme Court held that the jurisdictional nexus in the felon-in-possession statute required only "that the firearm have been, at some time, in interstate commerce."[2] 431 U.S. at 574, 97 S.Ct. 1963. *Scarborough* found that Congress intended to exert its "full Commerce Clause power" and that "Congress intended no more than a minimal nexus requirement." *Id.* at 571, 577, 97 S.Ct. 1963. McBee argues that *Scarborough* involved purely statutory interpretation; nevertheless, *Scarborough* clearly holds that a conviction under the felon-in-possession statute is justified if, as it did here, the firearm had previously traveled in interstate commerce.

---

[2] *Scarborough* involved an earlier version of the felon-in-possession statute, but there are no meaningful differences between the current version and the earlier version at issue in *Scarborough. United States v. Chesney,* 86 F.3d 564, 568-69 (6th Cir.1996).

The Sixth Circuit squarely addressed the constitutionality of the statute in *United States v. Chesney,* 86 F.3d 564, 570 (6th Cir.1996). It held that the felon-in possession statute was within the scope of Congress's Commerce Clause power. *Id.* Prior to *Chesney,* the Supreme Court had decided *United States v. Lopez,* which struck down a statute for exceeding the scope of the Commerce Clause. 514 U.S. 549, 567, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). *Chesney* applied the *Lopez* analysis to the felon-in-possession statute and held that the jurisdictional nexus of the statute placed the statute squarely within Congress's Commerce Clause powers. 86 F.3d at 570. It found that the nexus connected the statute to the regulation of commerce and ensured a case-by-case analysis of the connection to interstate commerce. *Id.* The *Chesney* court also noted that "the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits" had all reached the same result. *Id.*

McBee can point to no case which calls into question the authority of either *Scarborough* or *Chesney.* Instead, he cites a series of cases in which other circuits note that, whatever their views on the statute, they remain bound by *Scarborough. See, e.g., United States v. Patton,* 451 F.3d 615, 634 (10th Cir.2006); *United States v. Weems,* 322 F.3d 18, 26 (1st Cir.2003); *United States v. Lemons,* 302 F.3d 769, 773 (7th Cir.2002); *United States v. Cortes,* 299 F.3d 1030, 1037 n. 2 (9th Cir.2002); *United States v. Shelton,* 66 F.3d 991, 992 (8th Cir.1995) (per curiam). These cases-and many others-affirm the constitutionality of the felon-in-possession statute and the continuing authority of *Scarborough.* We thus join the chorus of circuits reaffirming the

precedential force of *Scarborough* and so **AFFIRM** the district court order.

United States District Court, E.D. Tennessee.
UNITED STATES of America, Plaintiff,
v.
Earl McBEE, Defendant.
No. 3:07-CR-63.
Aug. 27, 2007.

Steven H. Cook, U.S. Department of Justice, Knoxville, TN, for Plaintiff.

Stephen Ross Johnson, Ritchie, Dillard & Davies, PC, Knoxville, TN, for Defendant.

MEMORANDUM OPINION AND ORDER

THOMAS A. VARLAN, United States District Judge.

The defendant, Earl McBee, is charged with one count of being a felon in possession of firearms and ammunition, in violation of 18 U .S.C. § 922(g)(1). This criminal case is before the Court on the defendant's Motion to Dismiss [Doc. 17]. The defendant moves the Court to dismiss the indictment against him for lack of jurisdiction. Specifically, defendant contends that defendant's alleged conduct does not affect interstate commerce, thus there can be no federal question jurisdiction. Defendant further argues that the statute in question, 18 U.S.C. § 922(g), is unconstitutional because it exceeds the authority granted to Congress under the Commerce Clause of the United States Constitution. Chambers has been informed telephonically that the government does not intend to file a response to the

pending motion, and thus the matter is ripe for adjudication.

Motions to dismiss are governed by Rule 12 of the Federal Rules of Criminal Procedure, which permits pretrial consideration of any defense "the court can determine without a trial of the general issue." Fed.R.Crim.P. 12(b)(2). Generally, a defense can be determined before trial if it involves questions of law instead of questions of fact on the merits of criminal liability. *United States v. Craft,* 105 F.3d 1123, 1126 (6th Cir.1997). Accordingly, the defense may use a Rule 12(b) motion to raise for consideration such matters as "former jeopardy, former conviction, former acquittal, statute of limitations, immunity [and] lack of jurisdiction." *Id.* (quoting *United States v. Smith,* 866 F.2d 1092, 1096 n. 3 (9th Cir.1989)). In considering such motions, a trial court may "ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder." *Craft,* 105 F.3d at 1126.

Defendant contends that recent United States Supreme Court jurisprudence reflects a growing trend limiting Congress's power under the Commerce Clause. Defendant cites to several recent Commerce Clauses cases, including: *Solid Waste Agency of North Cook Co. v. United States Army Corps of Engineers,* 531 U.S. 159 (2001) (declaring a federal regulation unconstitutional as applied in that particular case); *United States v. Morrison,* 529 U.S. 598 (2000) (invalidating the Violence Against Women Act, 42 U.S.C. § 13981); *United States v. Jones,* 529 U.S. 848 (2000) (holding that the Commerce Clause

did not allow a federal arson statute to apply to a residence used for no commercial purpose); *United States v. Lopez,* 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A)).

Defendant concedes that, despite recent Commerce Clause jurisprudence, the United States Supreme Court has ruled in the past that, with respect to the instant statute, proof that a possessed firearm had, at some point in the past, traveled through interstate commerce was sufficient to satisfy the required nexus between possession and commerce. *Scarborough v. United States,* 431 U.S. 563 (1977). Defendant also concedes that *Scarborough* has never been formally reversed and, thus, remains good law. *See Agostini v. Felton,* 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

Therefore, the Court finds that under existing United States Supreme Court precedent, the government can meet the required Commerce Clause nexus by showing that the possessed firearm has, at some point in the past, traveled through interstate commerce. *Scarborough,* 431 U.S. at 566-67. Accordingly, defendant's motion [Doc. 17] is **DENIED.** In making this ruling, the Court is in no way weighing the evidence or otherwise making a factual determination. The government still bears the burden of proving all of the necessary elements of 18 U.S.C. § 922(g)(1) at trial.

IT IS SO ORDERED.